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90-1101

Supreme Court, U.S.
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SUPREME COURT OF THE UNITE[illegible]

OCTOBER TERM, 1990

No.

WILLIAM LEIGHTON,

Petitioner, Objector-Appellant,

v.

(1) BEATRICE COMPANIES, Inc. et al.

(2) Kohlberg Kravis Roberts & Co.,

and Joel B. Smilow,

(3) James L. Dutt,

Respondents, Defendants-Appellees.

PETITION FOR CERTIORARI

TO THE SUPREME COURT OF DELAWARE

AND APPLICATION FOR A CONTINUANCE

William Leighton
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

January, 1991

QUESTIONS PRESENTED

1. Whether the Delaware Supreme Court had jurisdiction over the person of petitioner, a resident and citizen of New York, to order petitioner to pay $6,194.54, $3,774.02, $318.00, $367.10, $1,399.62 and $2,586.41 to Delaware, Illinois and New York attorneys, respectively, three years after the case had been closed by the issuance of the mandate, without an evidentiary hearing, findings of fact or conclusions of law.

2. Whether the award of costs and expenses to attorneys in a conflict of interest, without a hearing, findings of fact and conclusions of law, does not violate the Due Process of the Laws clause of the Fourteenth amendment to the Constitution of the United States.

3. Whether an appeal taken in aid of this Court's certiorari jurisdiction in

No.87-304, October Term, 1987, was frivolous where such appeal sought State court determinations of issues arising under Article VI, Section 2 of the Constitution of the United States, the Investment Company Act of 1940, the Securities Exchange Act of 1934 and the Securities Act of 1933.

4. Whether the attorneys to whom the Delaware Supreme Court has awarded costs and expenses in September, 1990 and who have appeared "of counsel" in No. 87-304, October Term, 1987, should be disciplined pursuant to Rule 8 of this Court for having filed a brief in opposition to that petition for certiorari that has misled this Court and that has concealed respondents' ongoing fraud upon the stockholders of Beatrice Companies, Inc.

5. Whether the Delaware judges' obstruction of the administration of the federal securities laws should not be set aside and enjoined pursuant to the All Writs Act as being contrary to Article VI, Section 2 of the Constitution of the United States.

LIST OF ALL PARTIES TO THE PROCEEDING

Please see footnote 3.

3/ The appellees below, App.6a, are : Beatrice Companies, Inc. William O. Granger, Jr., Frank E. Grzelecki, David E. Lipson, Anthony Luiso, William S. Pigott, Angelo R. Arena, Bernard A. Monaghan, Omer G. Voss, Murray L. Weidenbaum, Alexander Brody, G.A. Constanzo, Walter J. Leonard, Goff Smith, James W. Cozad, James L. Dutt, Frederic E. Ritchie, Kohlberg Kravis Roberts & Co. On March 11, 1986, the general partners of Kohlberg Kravis Roberts & Co. were : Jerome Kohlberg, Jr., Henry R. Kravis, George R. Roberts and Robert I. MacDonnell.

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Harris Trust et al. v. E-II Holdings et al., 722 F. Supp. 429 (N.D. Ill., 1989), appeal pending, No. 90-1095, Seventh Circuit. 16

Herman & MacLean v. Huddleston, 359 U.S. 375 (1983) 30

Merritt Chapman & Scott v. Wolfson, 321 A. 2d 138 (Del. Supr., 1974) 36

Salomon Brothers v. Interstate Bakeries Corp., 576 A. 2d 650, 654 (Del. Ch. 1989). 32

OFFICIAL AND UNOFFICIAL REPORTS BY THE COURTS BELOW

The orders issued by the courts below, all of which are reproduced in the appendix, have not been published.

JURISDICTION

The jurisdiction of this Court is

invoked pursuant to 28 U.S.C. Sec. 1257(3). The claim under the Due Process clause of the Fourteenth Amendment was set up in petitioner's statement of position, App. 44a. The claim under Article VI, Section 2 was set up in petitioner's petition for rehearing ("reargument") under local practice). The petition was denied on October 11, 1990, App. 56a-58a.

CONSTITUTIONAL PROVISIONS, STATUTES etc. INVOLVED

(a) Article VI, Section 2 of the Constitution of the United States.

(b) The Due Process clause and the Equal Protection of the Laws clause of the Fourteenth Amendment to the Constitution of the United States.

(c) The Investment Company Act of 1940.

(d) The Securities Exchange Act of 1934.

(e) The Securities Act of 1933.

(f) Section 327 of the Delaware Corporation Law.

(g) Section 145 of the Delaware Corporation Law.

(h) Delaware Supreme Court Rule 18.

(i) Delaware Supreme Court Rule 20(f).

The relevant portions of these statutes and rules will be found in the appendix.

STATEMENT OF THE CASE

This is a petition for certiorari by a New York citizen and resident to review and set aside the decree of the Delaware Supreme Court ("court below"), dated September 7, 1990, App. 47a-56a, imposing costs and expenses upon petitioner in favor of six attorneys for the respondents based on a determination

made in October, 1987 that the underlying appeal was frivolous. Rehearing was denied by order dated October 11, 1990, App. 56a-58a.

The case was before this Court in No. 87-304, October Term, 1987 when certiorari was be denied, 484 U.S. 898 (1987). Rehearing was also denied. 484 U.S. 971, (1987).

In fact, during the period that the petition in No. 87-304 was being prepared for filing (after two extensions of time had been granted by Justices of this Court), the respondents were engaged in a conspiracy to violate, and did violate, several federal securities laws for the purpose of their unjust enrichment. For this reason, petitioner moved to vacate the judgment underlying the proceedings in No. 87-304. When that effort failed at the

trial court level in July, 1987, App. 1a-5a, petitioner appealed to the court below in compliance with this Court's holdings that all State remedies must be exhausted before a petition for certiorari will be considered.

The court below below ignored the pendency of the certiorari proceeding and dismissed the appeal on October 16, 1987, App. 6a-24a. Its order provided that the respondents' attorneys could file affidavits with respect to their alleged costs and expenses within thirty days. The attorneys failed to do so within that period of time and the mandate issued, App. 24a-25a. After that, five attorneys filed substantially identical affidavits, App. 25a-36a, claiming a total of $14,641.69 in "costs and expenses" allegedly incurred by them. None of these affidavits disclosed whether the

attorneys had been paid from some other source such as insurance carriers or their own clients, respondents here. The Beatrice-BCI merger contract specifically provides for the reimbursement of costs and expenses for a period of six years after the "Effective Date" of the merger, i.e. until April 17, 1992 inclusive. The court below found this to be "immaterial" to the defense presented by petitioner, App. 54a.

Petitioner promptly challenged the jurisdiction of the court below to consider the attorneys' requests since the mandate had issued and the case had been marked "closed". By order dated November 27, 1987, App. 37a-40a, the court below rejected the challenge and gave petitioner thirty days within which to submit a Statement of Position.

Petitioner did so but the

respondents failed to respond. Whereupon, the court below entered yet another order dated March 30, 1988, App. 42a-47a, acknowledging petitioner's Statement of Position, ignoring respondents' failure to respond thereto and affording petitioner the opportunity to file a Further Response by April 30, 1988. Petitioner complied with this order. Two years and four months later, on September 7, 1990, the court below entered an order imposing total "costs and expenses" upon petitioner in the amount of $14,641.69, App. 47a-56a. The respondents had not been heard from since November 16, 1987.

In addition, the court below imposed a "gag order" upon petitioner on March 30, 1988, which was designed to protect the respondents from challenges to their ongoing unjust enrichment, App. 41a-42a. In effect, the "gag order"

provided the respondents with an incentive to perpetrate a fraud upon the buyers of securities issued by a corporation, E-II Holdings, Inc., which had been formed by the respondents Kohlberg, Kravis, Roberts & Co. ("KKR") soon after the judgment sought to be reviewed in No. 87-304 became final. The fraud has been set forth at length in a suit filed by the Trustees under the indentures issued by E-II in a Chicago federal court. Harris Trust et al., v. E-II Holdings et al., 722 F. Supp. 429 (N.D. Ill., 1989), appeal pending, No. 90-1095, U.S. Court of Appeals for the Seventh Circuit. Due to the errors of the Delaware courts, the Harris suit is being decided without regard to respondents' recklessly illegal conduct.

WHEN AND HOW

THE FEDERAL QUESTIONS WERE RAISED

Petitioner raised the federal questions within one month after BCI's prospectus dated March 11, 1986 became effective under the Securities Act of 1933. The prospectus is not a part of the record because the Delaware judges have consistently refused to make it so. The questions were adverted to but not passed upon by the Chancellor in his opinion of April 16, 1986. The federal questions were again raised on appeal from the Chancellor's judgment of April 16, 1986 and were briefed by the respondents in opposition. The Delaware Supreme Court did not pass upon them in its order of February 20, 1987 dismissing the appeal from that judgment.

Petitioner again raised federal

questions in his application to vacate the judgment of April 16, 1986 made to the Chancellor. This time the Chancellor did not pass on those questions. App. 1a-4a. On the appeal here involved, petitioner again raised these federal questions and the court below enumerated them in its order of October 16, 1987, App. 18a-19a.

Following the entry of the final order dated September 7, 1990 imposing sanctions, petitioner moved the court below for leave to file a petition for rehearing setting forth other federal questions arising out of that order. The motion set up the federal claims with specific reference to 28 U.S.C. Sec. 1257(3). The motion was allowed but the petition for rehearing was denied as being "without merit", App. 56a-58a.

In accordance with Rule 13.4 of this Court, this petition for certiorari

is submitted for filing within ninety days from the date of the order denying rehearing.

ARGUMENT

Point I. The proceedings in No.87-304 October Term, 1987 should be judicially noticed

This proceeding is a continuation of No. 87-304, October Term, 1987, which ended on November 30, 1987 with the denial of the petition for rehearing. The actual sanctions were imposed upon petitioner on September 7, 1990. Rehearing was denied on October 11, 1990.

A supervening event is the decision of the Chicago federal district court in Harris, supra, which became final in January, 1990, and which is now on appeal to the Seventh Circuit, No. 90-1095 in that court. Whichever side

loses the Harris case, is sure to seek review here by petition for certiorari. At that point, the Harris case should be consolidated for hearing and decision with this case because the actions of the Delaware courts have obstructed fact finding in Harris.

The point has been made below and is repeated here: it was the duty of the Delaware courts to reopen the judgment of April 16, 1986 in light of the transactions in the properties of Beatrice that were made by the respondent KKR after that date. The Delaware courts have refused to do so and have invoked a State statute, 8 Del. C. Sec. 327, as their "authority" for obstructing the course of justice in the Federal courts of the Seventh Circuit. The obstruction comes in the nature of a jurisdictional controversy, namely, whether the Chicago courts or the

Delaware courts should decide if KKR's acquisition of Beatrice's 15 businesses was in accordance with Section 7 of the Investment Company Act as to which the Delaware courts have jurisdiction pursuant to Section 44 of that Act. If the acquisition was prohibited by that statute, then the Beatrice-BCI merger contract must be voided, with all the consequences which that implies for the Seventh Circuit litigation.

Assuming, as petitioner must, that the Harris litigation will come before this Court, it is imperative that this Court should have all the facts before it, the "facts of record" and the "facts not of record".

The connection between Harris and this case is also shown by the appearance of Winston and Strawn, Esqs. of Chicago, Illinois in both cases.

Kurt L. Schultz, Esq. of Winston & Strawn has appeared in No. 87-304, presumably on behalf of Beatrice. In Harris, Timothy J. Rivelli, Esq., Terry M. Grimm, Esq. and Gregory J. Bueche, Esq., of Winston & Strawn, have entered their appearances on behalf of E-II in the Seventh Circuit. Beatrice and E-II have the same address, Two North LaSalle Street, Chicago, IL 60602.

Also, in No. 87-304, Warren R. Stern, Esq. of Wachtell Lipton Rosen & Katz has appeared on behalf of Beatrice. Mr. Stern's law partners, Robert B. Mazur, Esq. and Eric M. Roth, Esq. are attorneys of record for American Brands, Inc. in the Harris case. American Brands is the buyer of the 15 businesses that belonged to Beatrice as late as July 2, 1987. In short, Wachtell Lipton have appeared for both seller (Beatrice) and buyer (American Brands) in the

transaction, less than one year apart (July, 1987 - February, 1988).

These are obvious conflicts of interest which the Seventh Circuit has not had an opportunity to rule on. There is no reason why this Court should decide whether certiorari ought to be granted or denied in this and the Harris case without these conflicts of interest being spelled out on the record.

Point II. The Delaware judges' total disregard for this Court's certiorari jurisdiction and for the commands of federal law

The events preceding and following the filing of petitioner's petition for certiorari in No. 87-304, October Term, 1987 ("87-304") lie at the core of the instant proceeding.

To start with, Article VI, Section 2 of the Constitution of the United

States requires State judges to conform their decisions and practice to federal law. Here, State judges using Sec. 327 of the Delaware Corporation Law, 8 Del. C. ("Section 327") as an obstruction, have refused to enforce the Securities Act of 1933 and the Investment Company Act of 1940, two statutes which expressly confer jurisdiction upon State courts, Sec. 22(a) of the 1933 Act and Sec. 44 of the 1940 Act.

While certiorari was being sought in 87-304, the State judges continued to ignore that proceeding even though they had notice of it. Two extensions of time to file that petition were granted by Justices of this Court on June 19 and July 22, 1987, respectively, on notice to the clerk of the Delaware Supreme Court. Notice of the filing of the petition and of respondents' answer thereto was given on September 21, 1987.

Nevertheless, the Delaware judges continued to defy federal law and entered their order of October 16, 1987, App. 6a-24a which, as it now turns out did not put an end to the controversy. The end came three years later, on when the Delaware judges entered yet another order imposing sanctions upon petitioner and in favor of respondents' attorneys, App. 47a-56a, and after denying petitioner's petition for rehearing as being "without merit", App. 56a-58a. Where a court reaches the merits of a petition for rehearing, State judges should be required to spell out their reasoning for the benefit of this Court. The Delaware State judges have not done so here.

Tne Delaware judges' disregard for their obligations under Article VI, Section 2 has resulted in the obstruction of justice in the federal

courts of the Seventh Circuit and the unjust enrichment of KKR in violation of Section 47(b)(3)(B) of the 1940 Act, 94 Stat. 2277. The Harris case which is slowly making its way to this Court, shows how respondent KKR, alias E-II, has succeeded in borrowing from the public on July 2, 1987 $1,500,000,000 against Beatrice assets with a book value of $1,067,542,000 inclusive of "intangible assets" of $476,230,000, i.e. a net of $591,312,000. At the very moment the borrowing was being made, the respondents KKR were persuading the Chancery Court not to reopen the judgment that had permitted the transfer of these assets from Beatrice to KKR, App. 1a-4a.

The Harris courts have no knowledge of these transactions and occurrences, see the opinion of the lower court at 722 F. Supp. 429. The

Harris lower court has assumed that the transfer had been "legal" for which reason declaratory judgment relief has been denied. Of course, if the transfer had been "illegal", the Harris court would have been justified to void the indentures pursuant to which KKR had borrowed $1,500,000,000 from an unsuspecting public.

Simply put, the respondents KKR are making money by confusing the courts and by manipulating judicial proceedings in three courts. In this endeavor, the respondents have been aided and abetted by the attorneys who have signed the brief in opposition to the petition in 87-304. That is why these attorneys should be disciplined pursuant to Rule 8 of this Court.

Point III. The violation of the Due Process clause by the Delaware appellate judges

In Delaware, there is only one appellate court, the Delaware Supreme Court. Its procedures are regulated by its Rules which are frequently "bent" in order to suit the State's attitude of hospitality to out-of-state corporate insiders. Out-of-state residents, such as petitioner, come before the Delaware courts by reason of their ownership of stock issued by Delaware corporations, such as Beatrice and BCI. These corporations are the product of a mail order system that seeks to attract as many out-of-state incorporators as possible because Delaware derives a substantial portion of its revenues from franchise fees paid by these corporations. It takes but one person to incorporate in Delaware and that

person can be the corporation's sole director and chief executive officer. This is what KKR have done here within one year of taking over Beatrice. As was determined by the Harris case, BCI, KKR's alter ego, had created E-II to whom it had transferred fifteen Beatrice businesses, 722 F. Supp. at 429.

As the ultimate overseer of this system, the Delaware appellate judges take liberties with the federal rights of out-of-state residents at the instance of corporation lawyers. The judges' philosophy seems to be : we'll do whatever we want in order to please the lawyers and their corporate clients, let the stockholders go to the U.S. Supreme Court and seek their remedies through the certiorari system.

The Delaware appellate judges do not sit only as an appellate court.

They also sit as a trial court making factual determinations where none had been made by the lower courts, as has happened here since at least March 11, 1986. The record shows that the Chancery Court's letter memorandums cover only four pages of the appendix, App. 1a-4a. The Delaware appellate judges' orders based thereon cover forty pages of the appendix, 6a-24a, 37a-40a, 41a-42a, 42a-47a, 47a-56a, 56a-58a.

These procedures violate the Due Process clause of the Fourteenth Amendment because the appellants are not given adversarial, evidentiary hearings. No such hearing has been held here and the record shows it, App. 53a.

On March 11, 1986, the respondent KKR alias BCI came out with a prospectus covering the BCI preferred that was to be issued and that was actually issued in connection with the Beatrice-BCI

merger. The prospectus, which had been filed with the S.E.C., was on some 216 pages and stated that it was valid until June 9, 1986. It covered transactions in Beatrice common stock for the period from March 11, 1986 through April 17, 1986, the "Effective Date" of the merger. Within the period of its validity, Beatrice was dissolved and liquidated by KKR on May 26, 1986, a fact duly noted but not ruled upon by the Delaware appellate judges, App. 18a at (E).

Over petitioner's objections, the prospectus never made it as a part of the record. Neither the Chancery judge nor the appellate judges have ever considered the contents of this prospectus despite their obligation to do so, see Section 22(a) of the Securities Act of 1933, and their constitutional obligation to abide by

that statute, see Article VI, Section 2. Obviously, the Delaware judges are taking a frivolous view of their obligations under the statute and the Constitution.

The prospectus was false, misleading and omitted to state material facts. These were (a) that KKR had control over a majority of Beatrice's outstanding voting stock which had been accumulated since July, 1985 by KKR-controlled limited partnerships, (b) that registration of BCI under the 1940 Act or an exemption therefrom had neither been made nor secured and (c) that the financing of the merger had not been approved by the Federal Reserve Board as being in compliance with Regulations G, U and X under Section 7 of the 1934 Act. It was circulated in order to deceive prospective buyers of Beatrice stock which was to be

exchanged, in part, for BCI preferred stock. The Beatrice stock continued to be traded on the New York Stock Exchange through April 17, 1986.

Prospective buyers of Beatrice stock were misled by these statements in the prospectus : "There are no federal or state regulatory requirements which remain to be complied with in order to consummate the Merger".

Through this deception, KKR's dreams of unjust enrichment were realized and came to light in the Harris decision which became final in December, 1989, more than three years later.

In Herman & MacLean v. Huddleston, 359 U.S. 375 (1983), this Court has set forth at length the obligations incurred by the issuer of a security and his absolute liability, even for innocent misstatements. And in Basic Inc. v. Levinson,, 485 U.S. 224 (1987), this

Court has outlined the principles which lower courts must follow in merger cases where the contestants are the shareholders against the corporation. Ignoring all of this, the Delaware judges have imposed another standard, the purchase-of-claim standard of 8 Del. C. Sec. 327.

According to that standard, one who purchases the stock of a Delaware corporation on the basis of a statutory prospectus has no right to challenge statements made in the prospectus that turn out to have been false, misleading and omissive of material facts. The purchaser of the stock does not even have the right to challenge post-purchase transactions and occurrences because he is presumed to have purchased the stock for the purpose of making such a challenge.

Not so, though, for the purposes

of the Delaware appraisal statute, 8 Del. C. Sec. 262. Just recently, a Chancery Court judge held in Salomon Brothers v. Interstate Bakeries Corp., 576 A. 2d 650, 654 (Del. Ch., 1989) :

> I find nothing in the purpose or language of Sec. 262 that would defeat Salomon's entitlement to an appraisal and I find nothing inequitable about an investor purchasing stock in a company after a merger has been announced with the thought that, if the merger is consummated on the announced terms, the investor may seek appraisal.

Therefore, the theory goes on, if such a challenge is made, as it was made here by this petitioner, the challenge is "frivolous" and the challenger must be sanctioned with the imposition of "costs and expenses" regardless of whether such costs and expenses have been reimbursed to the claimants by insurance carriers.

Tne claims made by petitioner on appeal were summarized by the Delaware

appellate judges, App. 18a-19a. None of these claims were disposed of on the merits and none were heard. Rather, the appellate judges held, at 19a, that the claims should have been made on March 6, 1986, fully fifteen months before the challenged transactions had been effected !

The holdings and procedures of the Delaware appellate judges are wanting in logic, defy reason and are arbitrary, capricious and ultra vires. They do not conform to Braley v. Campbell, 832 F. 2d 1504 (10th Cir., 1987), which the Delaware judges have adopted as their guide to decision.

Point IV. The respondents have not been heard from since November 16, 1987. Their arguments should not be initially heard by this Court in opposition to

this petition

The respondents have used hit-and-run tactics in the court below. After filing their affidavits on November 16, 1987 they have stood mute since they did not wish to disclose the manner in which they had been reimbursed by insurance carriers or by the charge-off to the $3,200,000 fee that had been allowed to the plaintiffs' attorneys by the Chancery Court. The record shows that the respondents did not take issue with petitioner's Statement of Position and with petitioner's Further Response. At that point, the Delaware appellate judges should have deemed petitioner's allegations to be true and should have terminated the proceedings.

Instead, twenty eight months later, the Delaware appellate judges entered their September 7, 1990 order,

App. 48a-57a and rewarded the respondents with an award of "costs and expenses" that had already been paid to the respondents by insurance carriers. The order does not even name the plaintiffs as parties to the proceeding but rewards their attorneys with $3,986.01 in addition to the $3,200,000 fee awarded by the Chancery Court to these attorneys. Please see p. 39a of the appendix in 87-304.

The Delaware appellate judges are evidently unaware of what constitutes Due Process of Law guaranteed by the Fourteenth Amendment. Since the respondents have created the problem and have failed to answer the Statement of Position and the Further Response, they should not be heard by this Court for the first time in opposition to this petition which is based on those pleadings.

Point V. Section 145 of the Delaware Corporation Law violates the Equal Protection of the Laws clause because it promotes the Delaware mail order system of corporate fraud

In order to protect its system from challenges under the federal constitution and laws, Delaware has enacted a law, Section 145, which gives corporate insiders unlimited cash advances for the purpose of defending against such challenges. Even convicted felons are entitled to cash advances for the purpose of defending against claims of corporate wrongdoing, Merritt Chapman & Scott v. Wolfson, 321 A. 2d 138 (Del. Supr., 1974).

The out-of-state objector, like petitioner, appearing in opposition to the "settlement" of suits charging

corporate fraud, like the instant suit, does not have a chance in a million in the Delaware courts. To begin with, the record is several hundred miles away from the objector's place of residence which means that the shareholder must either (a) at his own expense, retain Delaware counsel, who is generally not available, or (b) proceed pro se by written submissions. No one could match the financial muscle available to the insiders here. According to the prospectus, $53,750,000 was paid to insiders, including $45,000,000 to respondent KKR. This was in addition to the cash advances authorized by Section 145.

The respondents have retained counsel to maneuver the proceedings in No. 87-304 in such a way as to provide KKR with undreamed of profits. See

Harris, supra. These were realized in February, 1988 by and with the advice of the same counsel who had "found" buyers for parts of Beatrice. The buyers had been held back by counsel from bidding, in March 1986, for the parts of Beatrice that had been reserved for KKR as the lion's share of the kill. This conflict of interest on the part of counsel was again presented to the Delaware appellate judges in the petition for rehearing ("reargument" under local rule). It was overruled as being "without merit", App. 58a.

Point VI. The continuing obstruction of federal law

The Beatrice-BCI merger would not have been possible without the illegal "junk bond" financing provided by Drexel Burnham Lambert, Inc. ("Drexel"). On September 11, 1989, Drexel has pleaded guilty in the U.S.

District Court for the Southern District of New York to four counts of securities fraud and to two counts of mail fraud. It was sentenced to pay a fine of $78,000,000 and criminal penalties of $222,196,770.97, No. 88 Crim 41 KMW.

Following this plea, Drexel filed for bankruptcy in the same court on May 29, 1990, No. 90 B 11646 and is now effectively out of business. Drexel had realized $86,187,500 as "underwriting discounts" for a total of $2,500,000,000 in junk bonds which provided the core of the Beatrice-BCI merger financing. As a quid pro quo, Drexel received from KKR warrants to purchase BCI stock at $5 per share. Based on the final accounting with respect to these securities, Drexel appears to have an unrealized profit of $650,000,000. No disclosure had been made in the March 11, 1986 prospectus

that Drexel would receive any such warrants. The attorneys here involved had been given an opportunity to review the prospectus before mailing and had failed to disclose the fraud then being perpetrated upon Beatrice's shareholders.

In order to protect Drexel and KKR from the consequences of their actions, the attorneys here involved had also agreed upon the terms of an injunction running as to all Beatrice shareholders enjoining them from filing any actions against Drexel and KKR subsequent to the settlement. The injunction has not been served upon the Beatrice shareholders individually and the court below, bending its rules, has refused to require the defendants to make such service.

The result has been that no former Beatrice shareholder, other than

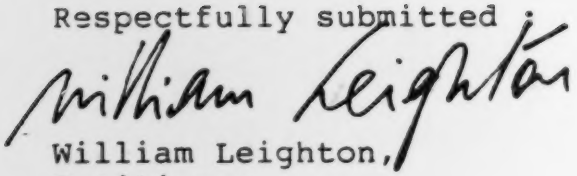
this petitioner, has sought relief from the judgment of April 16, 1986, App. 1a-4a. And for seeking such relief, the court below has imposed "costs and expenses" upon petitioner in favor of the attorneys who had combined, conspired, agreed and did damage Beatrice shareholders for the purpose of unjustly enriching Drexel and KKR, in violation of Section 47(b) of the 1940 Act, (App. 65a) and Section 7 of the 1934 Act, (App. 67a).

CONCLUSION

The petition for certiorari should be granted and the September 7, 1980 order of the Delaware Supreme Court should be summarily reversed.

This case may involve 28 U.S.C. Sec. 2403(b). Copies of this petition have also been served by mail upon the Attorney General of the State of Delaware.

Respectfully submitted ;



William Leighton,
Petitioner

January, 1991

APPLICATION FOR A CONTINUANCE

Pursuant to Rule 15.7 of the Rules of this Court petitioner hereby prays that this petition for certiorari be continued on this Court's docket pending decision by the Seventh Circuit on the appeal in the Harris case before it. The appeal has been argued on October 30, 1990.

In the Harris case, the district court had made these findings of fact which are clearly erroneous, F.R.Civ.P. 52(a) :

> In April 1986, BCI Holdings Corporation ("BCI") acquired Beatrice Companies, Inc. ("Beatrice") in a $6.2 leveraged acquisition (cmplt., para. 11). Subsequent to the acquistion of Beatrice, E-II was formed by BCI. In May, 1987, E-II had an initial portfolio of fifteen businesses that were once part of Beatrice. * * * On July 1, 1987, pursuant to Indentures, E-II issued to the public $1.5 billion in public debt : $$750 million in Notes and $750 million in Debentures. With respect to all relevant matters herein, the Indentures are identical. In the prospectus for the sale of both Notes and Debentures, E-II represented that it

would use a substantial portion of the proceeds of the public debt offering to pursue acquisitions for the holding company. (complt., para 16). See 722 F. Supp. at 429 ff:

Depending on how the Seventh Circuit disposes of the appeal before it, a supplemental brief may have to be filed in this Court, as authorized by Rule 15.7 for the purpose of showing that

(a) BCI has acquired Beatrice in violation of Section 7(a) of the 1940 Act and Regulations G, U and X under Section 7 of the 1934 Act; BCI had not registered as an investment company in accordance with the requirements of the 1940 Act;

(b) BCI was at all times 97% or more controlled by the respondents Kohlberg Kravis, Roberts & Co. ("KKR");

(c) E-II was created by KKR for the purpose of acquiring control of corporations engaged in interstate

commerce, without registering as an investment company under the provisions of the 1940 Act;

(d) Through Drexel, E-II has issued its public debt in violation of Regulation G under Section 7 of the 1934 Act and Section 7(a)(2) of the 1940 Act; that debt is now practically worthless owing to EII's inability to service it;

(e) the Delaware courts bear their share of the responsibility for this state of affairs due to their approval of the settlement of the Beatrice matter, please see the pleadings in 87-304.

Respectfully submitted :

William Leighton
Petitioner

January, 1991

90-1101

(2)

Supreme Court, U.S.
FILED
JAN 4 1991
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No.

WILLIAM LEIGHTON,

Petitioner, Objector-Appellant,

v.

(1) BEATRICE COMPANIES, Inc. et al.

(2) Kohlberg Kravis Roberts & Co.,

and Joel B. Smilow,

(3) James L. Dutt,

Respondents, Defendants-Appellees.

APPENDIX TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF DELAWARE

William Leighton
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

January, 1991

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The documents marked (*) and (**) were reproduced in the appendix to the petition for certiorari in No. 87-304, October Term, 1987, as follows :
(*) at pp. 68a-70a
(**) at p.71a

The document marked (***) was reproduced in the appendix to the petition for rehearing in No. 87-304, October Term, 1987 at pp. 101a-115a.

ADDENDUM

Constitution of the United States

Article VI, Section 2 59a

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Delaware Corporation Law, 8 Del. C.

Section 145 69a-74a

Section 327 75a

Delaware Supreme Court

Rule 18 75a-76a

Rule 20(f) 76a

COURT OF CHANCERY

OF THE STATE OF DELAWARE

William T. Allen Courthouse

Chancellor Wilmington, DE 19801

June 23, 1987

Messsrs. Leighton, Payson, Balotti and Rosenthal

Re : In re Beatrice Company Litigation, C.A. 8248

Gentlemen:

William Leighton, claiming to be a member of the class on whose behalf the captioned class action was litigated has moved "pursuant to the reservation of jurisdiction contained in the order and final judgment of April 16, 1986" to have the court vacate the judgment asserting that material information was not disclosed to the court at the time

the proposed settlement of this matter was approved pursuant to rule 23(e). He now seeks, among other things, to have the court order an audit by independent accountants of the profits realized by defendants Kohlberg, Kravis and Roberts as a result of the merger out of which this litigation grew.

Defendants resist the request on the bases that (1) the Final Judgment in this matter was affirmed by the (Delaware) Supreme Court and the reservation of jurisdiction goes only to the effectuation of the terms of the settlement, (2) the "new matter" asserted does not meet the test of Rule 60(b), and (3) in all events, the (Delaware) Supreme Court has held, conclusively, that Leighton had no standing to object to the terms of the

merger, having purchased his Beatrice stock after the announcement of the proposed merger.

I have reviewed each of Mr. Leighton's five submissions in support of the requested relief. The claims made therein do not seem to me to meet the tests required to open a judgment. See Poole v. N.V. Deli Maatschappij, Del. Ch. 257 A. 2d 241 (1969). Specifically, the information contained therein does not suggest to me that had assertions o f this type been made at the settlement hearing, a different result might likely have occurred. More fundamentally, I think defendants are correct that the Supreme Court of Delaware has ruled that Mr. Leighton has, under Delaware law, no standing to litigate any aspect of this matter having acquired his interests in

Beatrice with knowledge (or at least notice) of the transaction about which he seeks to complain.

For each of these reasons, the pending motion shall be and is denied.

Very truly yours,

/s/ William T. Allen

cc : Register in Chancery

(CAPTION AS ABOVE)

July 6, 1987

Gentlemen:

Mr. Leighton has moved for reargument of my June 23, 1987 decision on his motion to open judgment in the captioned case. His letter in support of this latest request for relief, in my opinion, states no reason to deviate from my June 23 opinion. For that reason, treating his letter as a motion

for reargument, that motion will be denied.

Very truly yours,

/s/ William T. Allen

cc : Register in Chancery

IN THE SUPREME COURT

OF THE STATE OF DELAWARE

WILLIAM LEIGHTON,

Objector Below, Appellant

v.

BEATRICE COMPANIES, INC., WILLIAM O. GRANGER, JR., FRANK E. GRZELECKI, DAVID E. LIPSON, ANTHONY LUISO, WILLIAM S. PIGOTT, ANGELO R. ARENA, BERNARD A. MONAGHAN, OMER G. VOSS, MURRAY L. WEIDENBAUM, ALEXANDER BRODY, G.A. CONSTANZO, WALTER J. LEONARD, GOFF SMITH, JAMES W. COZAD, JAMES L. DUTT, FREDERIC E. RITCHIE, KOHLBERG, KRAVIS ROBERTS & CO.,

Defendants Below, Appellees.

No. 231, 1987

Court below - Court of Chancery of the State of Delaware in and for New Castle County

Civil Action No. 8248 [1/]

1/ This caption appears on all the orders entered in this proceeding (No. 231, 1987) by the Delaware Supreme Court

O R D E R

Submitted : September 9, 1987

Decided : October 16, 1987

Before CHRISTIE, Chief Justice, HORSEY and MOORE, Justices.

This 16th day of October, 1987, the Court, after considering appellant's brief, the record and appellees' motions to dismiss, concludes that :

(1) Appellant, William Leighton (Leighton), appeals from an order of the Court of Chancery, dated June 23, 1987, declining to vacate a judgment entered on April 16, 1986, by which the court dismissed with prejudice several derivative claims and a class action. A motion for reargument was denied by the Court of Chancery on July 6, 1987. The history of this litigation

is extensive but only part of it must be outlined in this order.

(2) On October 16, 1985, Kohlberg Kravis & Roberts (KKR) submitted to the board of directors of Beatrice Companies, Inc. (Beatrice) an offer to acquire that company in a transaction in which Beatrice's stockholders would receive $40 in cash and preferred stock valued at $5 per share for each share of Beatrice common stock. The Board, however, after consulting its investment bankers, unanimously rejected the offer as inadequate.

(3) On October 29, 1985, KKR made a second proposal in which it increased its offer to $40 in cash and preferred stock with a market value of $7. The Board authorized management to

begin discussions with KKR in respect to its revised offer and to explore alternatives which would maximize the value of Beatrice to its stockholders. Thereafter, Beatrice's investment bankers contacted approximately seventy-five potential buyers to determine whether they were interested in acquiring all or part of Beatrice. [2/] In response to these inquiries, Dart Group Corp. expressed an interest in acquiring Beatrice for $48 per share in cash.

(4) On November 12, 1985, KKR made a revised offer to acquire Beatrice in a transaction involving $43 in cash and preferred stock valued at $7 per share. This offer, however, contained the following conditions: (a) a provision (the Termination Payment Provision) that, if the acquisition was

not completed and another party acquired thirty percent of Beatrice's common stock or made a firm proposal to acquire Beatrice for more than $50 per share, KKR would be entitled to a cancellation fee of $123 million; and (b) a provision (The Asset Option Provision) granting KKR an option to purchase either Beatrice's grocery food and Tropicana subsidiaries for $2.91 billion or certain alternative assets, including the Tropicana subsidiary, for a price of $2.412 billion. This November 12 offer was conditioned upon its acceptance by the Beatrice board by no later than November 13, 1985.

(5) On November 13 and 14, 1985, at a special board meeting, Beatrice's investment bankers indicated to the board that KKR's November 12

offer was fair to Beatrice's stockholders. The board also learned that the Dart Group Corp. had withdrawn its earlier offer. Additionally, KKR agreed to cause Beatrice, after the proposed merger, to honor amendments to existing executive compensation and severance agreements which the board had authorized prior to the initial KKR proposal.

(6) On November 14, 1985, the board accepted KKR's November 12 offer and entered into the following additional but related undertakings; (a) a merger agreement with BCI, a corporation KKR formed for the acquisition, which was to assure compliance with the Termination Payment Provision; and (b) a separate agreement with BCI accepting the Asset Option

Provision. the merger agreement also prohibited the solicitation of alternative proposals or offers for Beatrice or any of its subsidiaries.[2/]

(7) Various plaintiffs filed nine class and derivative claims in the Court of Chancery and seven related actions were filed in Illinois. These actions were subsequently consolidated. The complaints basically alleged (a) that Beatrice's officers and directors, aided and abetted by KKR, had breached their fiduciary duties to the Beatrice stockholders in entering into the merger agreement and the executive compensation and severance agreements, (b) that the Termination Payment Provision was excessive and illegal, and (c) the Asset Option Provision was invalid. Plaintiffs sought damages, an order

enjoining the operation of the Termination and Asset Option Provisions, and an order enjoining consummation of the proposed merger.

(8) Following extensive negotiations between Beatrice, KKR, and the plaintiffs, the parties entered into a memorandum of understanding on February 2, 1986. The memorandum provided the following : (a) termination of the agreement containing the Asset Option Provision; (b) reduction of the $123 million Termination Payment Provision to approximately $19 million; (c) revision of the merger agreement to delete the no-shopping provision, thus allowing Beatrice to solicit other offers and proposals;[2/] (d) confirmation of Beatrice's right to pay a cash dividend of up to $.45 per share on the

common stock; and (e) increase the annual interest rate on the BCI preferred stock issue in connection with the merger from 14 percent to 15 1/4 percent to be paid on a quarterly instead of a semiannual basis. Beatrice executives also agreed to reductions of $23 million in their executive compensation and severance agreements.

(9) On March 11, 1986, the parties entered into a stipulation and agreement of settlement in accordance with the terms of the memorandum. thereafter, the Court of Chancery certified a class consisting of all Beatrice stockholders at the close of business on February 20, 1986 (the record date for the stockholder vote on the proposed merger) and ordered a hearing to determine if the settlement

was fair and adequate. Notice of the hearing was mailed to the holders of record as of February 20, advising them of their right to appear and object.

(10) Although Leighton did not appear at the hearing, he did submit written statements objecting to the settlement. Leighton objected on the grounds that BCI was in violation of various provisions of the federal securities laws. [2/]

(11) After careful review, the Court of Chancery determined that the benefits provided to Beatrice and the class constituted "fair and reasonable compensation for the dismissal of the claims". The court also found the application of plaintiffs' counsel for attorneys' fees to be "fair and reasonable in the light of the work

involved, the contingent nature of the undertaking and the other appropriate factors". Thereafter on April 16, 1986, the court entered an order dismissing the claims with prejudice.

(12) Leighton appealed that order raising numerous arguments which had not been raised previously. In an order dated February 20, 1987, this Court held that Leighton, who had purchased the claim by buying his stock after the alleged wrongdoing, lacked standing to challenge the wrongdoing in a derivative capacity. Since he was not a member of the class certified, his claims were dismissed. In addition, this Court affirmed the Court of Chancery's determination that the settlement agreement was fair, reasonable and adequate. A subsequent motion to

reconsider the February 20 order was denied.

(13) On May 8, 1987, Leighton filed a motion to vacate the Court of Chancery's order and final judgment of April 16, 1986, approving the settlement. On June 23, 1987, the motion was denied.

(14) On June 29, 1987, Leighton filed a motion for reargument of the court of Chancery's decision of June 23 which denied his motion to vacate the April 16, 1986 judgment. On July 6, 1987, the Court of Chancery denied this motion.

(15) Leighton asserts that he does have standing to litigate alleged violation of the Court of Chancery's opinion of April 16, 1987 (sic) and argues in the instant appeal that :

(A) Defendants violated Regulations G and U under section 7 of the 1934 Act;

(B) Defendants violated the terms of the judgment when they called the BCI preferred stock, which was issued pursuant to the settlement, in exchange for debentures;

(C) Defendants violated S.E.C. Rule 10b-13;

(D) KKR garnered unjust enrichment at the expense of Beatrice shareholders;

(E) the defendants failed to disclose the plan of liquidation and dissolution of Beatrice by KKR;

(F) KKR partnerships garnered "undreamed of profits" from the Beatrice-BCI merger; and

(G) in light of the post-April 16, 1986 events, the settlement cannot be said to be fair, reasonable and adequate.

(16) None of Leighton's allegations were raised in the original unified complaint filed on March 6, 1986. Nor were they brought before the Court of Chancery by any named plaintiff or member of the certified class. Supreme Court Rule 8 explicitly states that "Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Leighton cannot transform contentions made for the first time in the instant appeal into the issues properly before the

Court of Chancery at the April 14, 1986 fairness hearing. The fact that these issues were not properly presented to the trial court is, alone, sufficient reason to dismiss Leighton's appeal. Under the circumstances here present the interests of justice do not require that these issues, not presented to the trial court, be considered.

(17) Further, this Court has previously ruled that Leighton lacks the fundamental standing prerequisites to present objections to the settlement at issue. In re Beatrice Co., Inc. Litigation, Del. Supr., Nos. 155 and 156, 1986, Horsey, J. (Feb. 20, 1987). To reiterate, since Leighton acquired his stock subsequent to the alleged wrongdoing, he has no standing to sue derivatively and challenge the

wrongdoing, and he is not a member of the certified class. Id., at 7. Leighton alleges that the contentions in this appeal concern post-April 14, 1986 transactions and occurrences which casts doubt as to the propriety of the Court of Chancery's April 16, 1987 (sic) opinion deeming the settlement to be fair. However, framing the appeal in light of post-April 14, 1986 transactions and occurrences does not confer standing upon him. Moreover, the practical effect is that the instant appeal is nothing more than a frivolous and untimely renewal of his unsuccessfulmotion to reargue the February 20, 1987 decision of this Court.

(18) Leighton contends that his having entered an appearance at the

April 14, 1986 hearing before the Court of Chancery without objection from appellees, confers standing upon him to see that the terms of the judgment are carried out. However, the argument disregards the February 20, 1987 mandate of this Court. Moreover, it is a long recognized principle of law that questions of jurisdiction may be raised mat any stage of the proceeding and are not waived. See McGrath v. Kristensen, 340 U.S. 167 (1950); 67A CJS Parties Sec. 125 (1978).

(19) Appellees are entitled pursuant to Supreme Court rule 20(f) to a special order assessing costs in addition to those provided for in Supreme Court Rule 20(d), including costs incurred in the preparation and transmission of the record, the costs of

the transcript, and the reasonable expenses incurred by appellees in connection with this appeal including attorneys' fees.

(21) Appellees are instructed to file not later than thirty (30) days from the date of this order an affidavit detailing the reasonable costs and expenses claimed in accordance with paragraphs 19 and 20 hereof for consideration by this Court in determining the amount to be awarded pursuant to this order.

Now, therefore, this Court orders that appellees' motions to dismiss the above captioned appeal are granted and that appellant is ordered to pay costs to be assessed by this Court. Since the motions to dismiss are granted, this Court need not

address appellees' motion to affirm.

BY THE COURT :

/s/ Andrew D. Christie

Chief Judge

2/ This emphasis added.

MANDATE

THE SUPREME COURT OF THE

STATE OF DELAWARE

To : Court of Chancery of the State of Delaware in and for New Castle County: GREETINGS:

Whereas in the case of WILLIAM LEIGHTON C.A. 8248 v. BEATRICE COMPANIES, INC. a certain judgment or order was entered on the 6th day of July, 1987 to which reference is hereby made, and

Whereas by appropriate

proceedings the judgment or order was duly appealed to this Court and after consideration has been finally determined, as appears from the opinion or order of this Court filed on October 16, 1987, a certified copy of which is attached hereto;

On consideration whereof it is ordered and adjudged that the appeal be and it is hereby dismissed.

SIGNED, SEALED AND ATTESTED

By : _____

Clerk of the Supreme Court

Issued November 13, 1987

Supreme Court No. 231, 1987

(CAPTION) [1/]

Affidavit of Donald J. Wolfe, Jr.

1. I am, and since the inception of this appeal, have been a member of

the firm of Potter Anderson & Corroon, Delaware counsel for appellees Kohlberg Kravis Roberts and Co. and Joel E. Smilow.

2. By Order herein dated October 16, 1987, this Court granted appellees' motions to dismiss this appeal and ruled that appellees are entitled pursuant to Supreme Court Rule 20(f) to a special order assessing costs in addition to those provided for in Supreme Court Rule 20(d), including costs incurred in the preparation and transmission of the record, the cost of the transcript, and the reasonable expenses incurred by appellees in connection with this appeal including attorneys' fees. Pursuant to that ruling, this Court directed appellees to submit affidavits detailing their reasonable costs and expenses

claimed under these provisions. This affidavit is submitted in compliancewith that instruction.

3. Attached hereto as Exhibit 'A' is a schedule of the costs incurred by appellees Kohlberg Kravis Roberts & Co. and Joel E. Smilow in connection with the captioned appeal.

4. Attached hereto as Exhibit 'B' is a schedule of the time expended by each attorney of this firm on behalf of these appellees in connection with this appeal.

/s/ Donald J. Wolfe, Jr.

(Sworn to November 16, 1987)

(Exhibits 'A' and 'B' are not reproduced)

(CAPTION) [1]

Affidavit of Mary Elizabeth McGarry

Mary Elizabeth McGarry, being duly sworn, deposes and says :

1. I am an attorney associated with the firm of Simpson Thacher & Bartlett (a partnership which includes professional corporations), with Potter Anderson & Corroon, attorneys for appellees Kohlberg Kravis Roberts & Co. and Joel E. Smilow.

2. By order herein dated October 16, 1987, this Court granted appellees' motions to dismiss this appeal and ruled that appellees are entitled, pursuant to Delaware Supreme Court Rule 20(f), to a special order assessing costs against objector below-appellant William Leighton in addition to those provided for in Supreme Court Rule 20(d), and the

reasonable expenses incurred by appellees in connection with this appeal, including attorneys' fees. Pursuant to that ruling, this Court directed appellees to submit affidavits detailing their reasonable costs and expenses claimed under these provisions. This affidavit is submitted in compliance with that order.

3. Attached hereto as Exhibit 'A' is a schedule of the attorneys' fees of this firm incurred by appellees Kohlberg Kravis Roberts & Co. and Joel E. Smilow in connection with the capticned appeal.

4. Attached hereto as Exhibit 'B' is a schedule of the disbursements expended by this firm on behalf of these appellees in connection with this appeal.

5. Accordingly, this firm's

attorneys' fees were $3,586.87 and related disbursements were $187.15, for a total amount of $3,774.02.

/s/ Mary Elizabeth McGarry

(Sworn to November 12, 1987)

(Exhibit 'A' and 'B' are not reproduced)

(CAPTION) [1/]

Affidavit of Craig B. Smith

1. I am and, since the inception of this appeal, have been member of the firm of Lassen, Smith, Katzenstein and Furlow, Delaware counsel for appellee James L. Dutt.

2. By Order herein dated October 16, 1987, this Court granted appellees' Motions to dismiss this appeal and ruled that appellees were entitled pursuant to Supreme Court Rule 20(f) to a special

order assessing costs in addition to those provided for in Supreme Court rule 20(d), including costs incurred in the preparation and transmission of the record, the costs of the transcript, and the reasonable expenses incurred by appellees in connection with this appeal, including attorneys' fees. Pursuant to that ruling, this Court directed appellees to submit affidavits detailing their reasonable costs and expenses claimed under these provisions. This affidavit is submitted in compliance with that instruction.

3. Attached hereto as Exhibit 'A' is a schedule of the costs incurred by appellee James L. Dutt in connection with the captioned appeal.

4. Attached hereto as Exhibit 'B' is a schedule of the time expended

and the fees charged by each attorney of this firm on behalf of James L. Dutt in connection with this appeal.

/s/ Craig B. Smith

(Sworn to November 13, 1987)

(Exhibits'A' and 'B' are not reproduced)

(CAPTION) [1/]

Affidavit of Thomas F. Ging

1. I am and, since the inception of this appeal, have been a member of the firm of Isham, Lincoln & Beale, Chicago counsel for appellee James L. Dutt.

2. By Order herein dated October 16, 1987, this Court granted appellees' motions to dismiss this appeal and ruled that appellees were entitled pursuant to Supreme Court Rule 20(f) to a special order assessing costs in addition to

those provided for in Supreme Court Rule 20(d), including costs incurred in the preparation and transmission of the record, the cost of the transcript, and the reasonable expenses incurred by appellees in connection with this appeal, including attorneys' fees. Pursuant to that ruling, this Court directed appellees to submit affidavits detailing their reasonable costs and expenses claimed under these provisions. This affidavit is submitted in compliance with that instruction.

3. Attached hereto as Exhibit 'A' is a schedule of the costs incurred by appellee James L. Dutt in connection with the proposed appeal.

4. Attached hereto as Exhibit 'B' is a schedule of the time expended and the fees charged by each attorney of

this firm on behalf of James L. Dutt in connection with this appeal.

/s/ Thomas F. Ging

(Sworn to November 12, 1987)

(Exhibits 'A' and 'B' are not reproduced)

(CAPTION) [1]

Affidavit of Joseph A. Rosenthal

1. I am and, since the inception of this appeal, have been a member of the firm of Morris Rosenthal Monhait & Gross, P.A., Delaware counsel for plaintiffs-appellees.

2. By Order herein dated October 16, 1987, this Court granted appellees' Motions to dismiss this appeal and ruled that appellees were entitled, pursuant to Supreme Court Rule 20(f), to a special order assessing costs in

addition to those provided for in Supreme Court Rule 20(d), including costs incurred in the preparation and transmission of the record, the cost of the transcript, and the reasonable expenses incurred by appellees in connection with this appeal, including attorneys' fees. Pursuant to that ruling, this Court directed appellees to submit affidavits totalling their reasonable costs and expenses under these provisions. This affidavit is submitted in compliance with that direction.

3. Attached hereto as Exhibit 'A' is a schedule of the time expended by affiant ("JAR") and Norman M. Monhait, Esquire ("NMM"), the members of affiant's firm who expended time on behalf of plaintiffs-appellees in

connection with this appeal.

4. Attached hereto as Exhibit 'B' is a schedule submitted to affiant by the firm of Wolf Popper Ross Wolf & Jones, plaintiffs-appellees' lead counsel in this litigation, showing the time expended by Lester L. Levy, Esquire "LLL"), a member of that firm and Karen E. Clark ("KEC"), a summer associate at that firm.

5. Attached hereto as Exhibit 'C' is a schedule of the costs incurred by plaintiffs-appellees in connection with this appeal.

/s/ Joseph A. Rosenthal

(Sworn to on November 13, 1987)

(Exhibits 'A', 'B' and 'C' are not reproduced)

(CAPTION) [1]

O R D E R

Before CHRISTIE, Chief Justice, HORSEY and MOORE, Justices.

This 27th day of November, 1987, it appears from the record that :

(1) By order dated October 16, 1987, this Court

(a) Granted appellees' motion to dismiss the appeal;

(b) Ordered that appellant must pay costs and expenses under Supreme Court Rule 20(f) in addition to those provided under Rule 20(d), and

(c) Instructed appellees to file appropriate affidavits in connection with their costs and expenses within thirty days.

(2) Pursuant to the instructions of this Court, affidavits

were filed by the following attorneys on the following dates:

Craig B. Smith, Esquire 11/13/87
(attorney for James L. Dutt)

Thomas F. Ging, Esquire 11/13/87
(Attorney for James L. Dutt)

Donald J. Wolfe, Jr., Esquire 11/16/87
(attorney for Kohlberg, Kravis, Roberts and Co. and Joel E. Smilow)

Mary Elizabeth McGarry, Esquire 11/16/87
(attorney for Kohlberg, Kravis, Roberts and Co. and Joel E. Smilow)

Joseph A. Rosenthal, Esquire 11/16/87
(attorney for Bertha Watkins)

(3) a final mandate was issued by this Court on November 13, 1987.

(4) By informal letter addressed to the Clerk of this Court dated November 20, 1987 and received on November 23, 1987, appellanat, William

Leighton, attempts to assert the position that "jurisdiction over the cause has been exhausted on November 13 (and) I must object to the submission of these affidavits . . . on the ground that the Court has lost jurisdiction on November 13, and . . . it is without power to enter any further orders in this cause."

(5) the position which appellant seeks to assert informally is obviously without merit since the very order as to which the mandate was entered on November 13, 1987 specifically contemplated the later entry of a further order in this Court as to costs and expenses and assigned appellees affirmative duties in regard to that matter.

NOW, THEREFORE, IT IS ORDERED

that :

(1) Appellant's informal application to terminate proceedings in this Court as to costs and expenses under Rule 20 is denied, and

(2) Appellant is given thirty days from the date of this order within which to state a position, if he wishes to do so, as to the reasonableness of the fees and costs claimed in the affidavits listed in paragraph 2 (above) of this order, and in the absence of a response directed to the reasonableness of the costs and expenses sought, the Court will assume that appellant takes no position thereon.

BY THE COURT :

/s/ Andrew D. Christie

Chief Justice

(CAPTION) [1/]

O R D E R

This 30th day of March, 1988, it appears that,

(1) By order dated October 16, 1987, this Court ruled that the appeal is to be dismissed. The only issue now pending before the Court is the imposition by the Court of costs and expenses upon appellant under Rule 20.

(2) By communications addressed by appellant to the Clerk of the Court dated February 26, 1988 and March 1, 1988, appellant attempts to communicate further with the Court in regard to matters other than the assessment of costs and expenses. Such communications are not relevant to any issue before the Court and are unacceptable to the Court.

NOW, THEREFORE, those portions of the communications from appellant dated February 26, 1988 and March 1, 1988 not related to the assessments of costs and expenses are stricken, and appellant is instructed to communicate with the Court only in accord with the rules and in accord with the order of this Court of even date herewith.

BY THE COURT: /s/ Andrew D. Christie
Chief Justice

(CAPTION) [1]

O R D E R

Before CHRISTIE, Chief Justice, HORSEY and MOORE, Justices

This 30th day of March, 1988, the Court after considering the record, appellees' affidavits, appellant's Statement of Position with respect to

costs and expenses claimed by appellees concludes that :

(1) On October 16, 1987, this Court entered an order dismissing this appeal as frivolous with leave to appellees to seek their costs and expenses. On November 27, 1987, this Court entered an order granting leave to appellant, William Leighton, to state a position with respect to the amounts claimed by appellees for costs and expenses.

(2) Appellant filed an untimely response, and the Court ruled that it would accept it and consider the points raised. Appellees were also given an opportunity to respond to appellant's Statement of Position.

(3) In the Statement of Position with respect to costs and

expenses claimed by appellees, appellant contends : (a) that this Court has no personal jurisdiction over him; (b) that appellees' affidavits omitted material facts and were misleading; (c) that the Court erred in labeling the appeal frivolous because the order did not take notice that a petition for certiorari had been filed with the United States Supreme Court and dismissal of the appeal disturbed the federal scheme for the exhaustion of State remedies; (d) that appellant was denied due process of the laws and equal protection of the laws; and (e) that a conspiracy existed between the plaintiffs' and defendants' Delaware attorneys to deny shareholders of target Delaware corporations their federal rights and to prepare the way for the defendants' unjust enrichment.

(4) In Braley v. Campbell, 10th Cir., 832 F. 2d 1504 (1987), the United States Court of Appeals for the Tenth circuit stated that under the Federal Rules of Appellate Procedure, notice and opportunity to be heard should be given an attorney to allow the attorney to present defenses to avoid or mitigate damages before a Court enters final judgment imposing sanctions on the attorney for bringing frivolous, multiplicitous, or vexatious appeals, Id. at 1514-15. The Court also stated that when a Court intends to consider such sanctions sua sponte, due process is satisfied by the issuance of an order to show cause why sanctions should not be imposed and by providing a reasonable opportunity for filing a response. Id. at 1515.

(5) This Court finds the decision in the case of Braley v. Campbell to be persuasive as to the procedural aspects of the imposition of sanctions by an appellate court. Therefore, in the interests of fairness, this Court will grant appellant a chance to file a further response in order to state any additional defenses he may wish to raise to avoid or mitigate the propose imposition of costs and expenses.

Now, therefore, this Court orders that appellant may file a further response presenting any additional defenses to avoid or mitigate the imposition of costs and expenses provided, however, that such further response must be filed not later than April 30, 1988.

BY THE COURT :

/s/ Andrew D. Christie

Chief Justice

(CAPTION) [1]

O R D E R

Submitted : April 11, 1988

Decided : September 7, 1990

Before : CHRISTIE, Chief Justice, HORSEY and MOORE, Justices.

This 7th day of September, 1990, it appearing that :

(1) By order dated October 16, 1987, this Court ruled that the appeal in this case is dismissed. The only issue left pending before the Court is the imposition by the Court of costs and expenses upon appellant under Supreme Court rule 20. Affidavits were filed by six attorneys who were involved in the

appeal.

(2) On November 20, 1987, the appellant, William Leighton, informally applied by letter to this Court to terminate the proceedings in this Court. He contended that if the case is closed, the affidavits submitted by the attorneys are improper since the Court now lacks jurisdiction to consider them.

(3) On November 27, 1987, this Court issued an order which denied Leighton's termination request and which gave him thirty days to state his position as to the reasonableness of the attorneys' fees and costs submitted in the affidavits. Leighton responded with a 10-page Statement of Position, and the Court accepted it even though it was filed two days late. In his statement, Leighton challenged the Court's

jurisdiction to assess the additional costs and challenged the amount of attorneys' fees and expenses included in those costs. He also contended that since the United States supreme Court did not characterize the appeal as frivolous when he petitioned for certiorari, the appeal in this Court could not be deemed frivolous.

(4) Leighton wrote letters to the Court which were dated February 26, 1988, March 1, 1988 and March 14, 1988 to which he attached "exhibits" and requested that additional matters be considered by the Court in conjunction with the pending matters.

(5) On March 30, 1988, this Court issued two more orders. In the first order, the Court ruled that the portions of Leighton's February 26 and

March 1 correspondence not related to the assessment of costs and expenses were to be stricken. In the second order, the Court gave Leighton another opportunity to present any defenses to avoid or mitigate the imposition of costs and expenses. Leighton timely responded on April 11, 1988 in an 8-page memorandum. He responded again on May 13, 1988. In the April 11 correspondence, Leighton reasserted the various points that previously had been dismissed because he lacked standing. He also challenged the fees and expenses submitted by the attorneys in their affidavits, contending that this Court had no jurisdiction to impose additional costs upon him and that the attorneys' fees were excessive. He further contended that the affidavits omitted

material facts as to the payment of those attorneys' fees and expenses, such as whether the attorneys' fees and expenses had been paid by any insurance carrier which had indemnified the attorneys' clients. He alleged that Mr. Rosenthal had a conflict of interest because Mr. Rosenthal represented plaintiffs against Beatrice as well as derivative plaintiffs on behalf of Beatrice, and alleged that Ms. McGarry was not subject to the disciplinary action of this Court because she is a New York attorney. This Court did not consider the May 13 correspondence because it was untimely filed and contained more arguments on the merits of the underlying case.

(6) In a case where sanctions are imposed upon the finding of a

frivolous appeal, the person against whom costs are assessed must have : 1) notice that such sanctions are being considered by the Court and 2) a subsequent opportunity to respond. Braley v. Campbell, 832 F. 2d 1504 (10th Cir., 1987). In this case, Leighton had adequate notice of the Court's intention to assess costs as well as every opportunity to respond. The appellees, in their motions dated July 31, 1987 and August 3, 1987, moved to dismiss the appeal and for an award of costs and expenses. Leighton responded to those motions. Although the Court did not issue a notice to show cause to Leighton, he was given the opportunity to respond to the orders of the Court dated November 27, 1987 and March 30, 1988, which clearly sets forth the

Court's intention to assess costs against him. Not only did Leighton respond to the Court's orders, but he continually sent unsolicited correspondence to the Court. The right to respond does not require an adversarial, evidentiary hearing, Braley, 832 F. 2d at 1515. [2/]

(7) After reviewing the record, the affidavits submitted by the attorneys and the appellant's responses to the orders of the Court, we find that the costs including attorneys' fees and expenses requested are reasonable under the circumstances. As to the contention raised by appellant that the Court lacks jurisdiction to assess costs against him, we find it to be without merit. In its order dated October 16, 1987, this Court dismissed the appeal and ordered

appellant to pay costs to be assessed by the Court. The underlying case wasclosed on November 13, 1987 as to the appeal, but since the additional costs under Rule 20 had not yet been assessed and Leighton had not yet paid those costs, this Court retained jurisdiction as to the sanction aspect of the case. 2/ As to appellant's other contentions regarding the possible indemnification by insurance carriers, the conflict of interest of Mr. Rosenthal, and the allegation that Mc. McGarry is not subject to the disciplinary powers of this Court, we find them to be immaterial to the imposition of sanctions against appellant.

NOW, THEREFORE, IT IS ORDERED that: Appellant is to pay the sum of $6,194.54 to :

Donald J. Wolfe, Jr., Esquire
Potter, Anderson & Corroon
350 Delaware Trust Building
P.O. Box 951
Wilmington, DE 19899

Appellant is to pay the sum of

$3,774.02 to :

Mary E. McGarry, Esquire
Simpson Thacher & Bartlett
c/o of Potter Anderson and
Coroon

Appellant is to pay the sum of

$318.00 to :

Craig B. Smith, Esquire
Lassen Smith Katzenstein &
Furlow
1220 Market Building
P.O. Box 410
Wilmington, DE 19810

Appellant is to pay the sum of

$367.10 to :

Thomas F. Ging, Esquire
Isham, Lincoln & Seale
c/o Lassen Smith Katzenstein
& Furlow

Appellant is to pay the sum of

$1,39[illegible].62 to :

Joseph A. Rosenthal, Esquire
Morris Rosenthal Monhait &
Gross
One Customs House Square
P.O. Box 1070
Wilmington, DE 19899

Appellant is to pay the sum of $2,586.41 to :

Lester L. Levy, Esq.
Wolf Popper Ross Wolf & Jones
c/o Morris, Rosenthal, Monhait and Gross.

IT IS FURTHER ORDERED that appellant will file no further in this matter without permission of the Court.

BY THE COURT :

/s/ Andrew D. Christie

Chief Justice

(CAPTION) [1]

O R D E R

Submitted : September 17, 1990

Decided : October 11, 1990

Before : CHRISTIE, Chief Justice, HORSEY, and MOORE, Justices.

This 11th day of October, 1990, it appears to the Court that :

(1) By order dated September 7,

1990, the Court ruled on the final issue in this appeal concerning the imposition of costs and expenses. The Court's order of September 7, 1990 directed the appellant to pay certain specified sums to six attorneys who were involved in the appeal. The Court's order of September 7, 1990 directed the appellant not to file further papers in this appeal without permission of the Court.

(2) On September 17, 1990, the Court received the appellant's motion for reargument pursuant to Supreme Court Rule 18. The appellant's motion was prefaced by a request for permission to file the motion in accordance with the Court's order of September 7, 1990. The Court directed the Clerk to docket the appellant's motion on September 17, 1990.

(3) The Court has considered the appellant's motion pursuant to Supreme Court Rule 18 for reargument of this Court's order dated September 7, 1990 and has concluded that the motion is without merit.

NOW, THEREFORE, IT IS ORDERED that the motion for reargument is DENIED.

BY THE COURT :

/s/ Andrew D. Christie

Chief Justice

ADDENDUM

Constitution of the United States;

Article VI, Section 2 :

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment 14 :

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Investment Company Act of 1940, 15 U.S.C. Sec. 80a-1 et seq.

Definition of Investment Company Section 3 states, in pertinent part:

(a) When used in this title, "investment company" means any issuer which-

(1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities; * * *

(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 percentum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

Section 3(b)(2) states, in pertinent part :

(b) Notwithstanding paragraph (3) of subsection (a), none of the following persons is an investment company within the meaning of this title : * * *

(2) Any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing,

reinvesting, owning, holding, or trading in securities. * * *

Exemptions. Section 6(c) states, in full:

> The (S.E.C.), by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title.

Transactions by Unregistered Investment Companies, 15 U.S.C. Sec. 80a-7a:

Section 7(a). No investment company organized or otherwise created under the laws of the United States or of a State and having a board of directors, unless registered under section 8, shall directly or indirectly -

(1) offer for sale, sell, or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person;

* * *

(2) purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the mails or any means or

instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person;

(3) control any investment company which does any of the acts enumerated in paragraphs (1) and (2);

(4) engage in any business in interstate commerce; or

(5) control any company which is engaged in any business in interstate commerce.

Jurisdiction of Offenses and Suits. Section 44 of the Act, 15 U.S.C. Sec. 80a-43 states:

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of

violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder.* * *

Validity of Contracts.

Section 47(a) of the 1940 Act states in full and Section 47(b) states in part :

(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b)(1) A contract that is made, or whose performance involves, a violation of this title, or of any rule, regulation

or order thereunder, is unenforceable by either party (or by a nonparty to the contract who acquired a right under the contract with knowledge of the facts by reason of which the making or performance violated or would violate any provision of this title or of any rule, regulation or order thereunder) unless a court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the purposes of this title.

Securities Exchange Act of 1934.

Margin Requirements. Section 7(a) states, in pertinent part :

For the purpose of preventing the excessive use of credit for the purchase or carrying of securities, the

Board of Governors of the Federal Reserve System shall, prior to the effective date of this section and from time to time thereafter, prescribe rules and regulations with respect to the amount of credit that may be initially extended and subsequently maintained on any security (other than an exempted security). * * *

Validity of Contracts. Section 29(b) states, in pertinent part :

Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation

of, any provision of this title or any rule or regulation thereunder shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person, who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation:

* * *

8 Del. C. Sec. 145 states, in pertinent part :

Indemnification of officers, directors, employees and agents; insurance

(a) A corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director. officer, employee or agents of the corporation or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorney's

fees), judgments fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation * * *

(b) A corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation, or is or was serving at the request of the corporation as a

director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable (for negligence or misconduct in the performance of his duty) to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or

suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled for such expenses which the Court of Chancery or such other court shall deem proper. * * *

(d) Any indemnification under subsections (a) and (b) of this section (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsections (a) and (b) of this section. * * *

(e) Expenses incurred by an officer or director in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the corporation as authorized in this section. Such expenses incurred by other employees and agents may be so paid upon such terms and conditions, if any, as the board of directors deems appropriate.

(f) the indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed

exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office.

(j) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

8 Del. C. Section 327 states in full : Stockholder's derivative action; allegation of stock ownership

In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which he complains or that his stock thereafter devolved upon him by operation of law.

Delaware Supreme Court:

Rule 18. Reargument. A motion for reargument may be filed with the Clerk within 15 days after filings of the court's opinion or order unless the time is enlarged by the Court. The motion shall succinctly state the grounds therefor and shall be supported by a certificate of counsel that it is

presented in good faith and not for delay. The motion shall not be subject to oral argument; no answer to the motion shall be permitted unless requested by the Court. Orders entered under Rules 41 and 42 shall not be subject to reargument.

Rule 20. Fees and Costs. * * *

(f) Frivolous Appeals. The Court may in any case involving a frivolous appeal, enter a special order assessing costs in addition to those provided for by paragraph (d) as justice may require. Such additional costs may, in the discretion of the court, include the costs incurred in the preparation and transmission of the record, the cost of the transcript and the reasonable expenses of any appellee.